No. 15-51241

In the United States Court of Appeals for the Fifth Circuit

Cleopatra DeLeon; Nicole Dimetman; Victor Holmes; Mark Phariss,
Plaintiffs-Appellees,

v.

Greg Abbott, In His Official Capacity as Governor of the State of Texas; Ken Paxton, In His Official Capacity as Texas Attorney General; John Hellerstedt, In His Official Capacity As Commissioner Of The Texas Department Of State Health Services,
Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Texas, San Antonio Division
Case No. 5:13-cv-982

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Certificate of Interested Persons

Counsel of record certifies that the following persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiffs	Plaintiffs' Counsel
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Statement Regarding Oral Argument

The State believes that oral argument will materially assist the Court in its determination of the issues presented in this appeal. This case presents issues regarding the appropriateness of an attorney's fee award that tests the limits in section 1983 litigation. It is of great import that any award that implicates the disposition of public resources be a fair and reasonable fee under the law. The determination of those issues heavily relies on detailed records which may prove difficult to evaluate through a mere review of the record. Therefore, oral argument would significantly assist the Court in evaluating these issues.

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Statement of Jurisdiction

Defendants-Appellants Greg Abbott, in his official capacity as Governor of the State of Texas, Ken Paxton, in his official capacity as Texas Attorney General, and John Hellerstedt, M.D., in his official capacity as Commissioner of the Texas Department of State Health Services (collectively, "the State") respectfully appeal the district court's order of November 30, 2015, awarding the Plaintiffs-Appellees attorney's fees in the amount of $585,470.30 and $20,202.90 in costs. *See* ROA.3506. The State filed a timely notice of appeal on December 29, 2015. *See* ROA.3510-11. This Court has jurisdiction to review the district court's fee award under 28 U.S.C. § 1291.

Statement of the Issue

Did the district court abuse its discretion in awarding attorney's fees in the amount of $585,470.30, and $20,202.90 in costs?

Statement of the Case

On October 28, 2013, the Plaintiffs filed a complaint challenging Texas' prohibition on same-sex marriage, set forth in Article I, Section 32 of the Texas Constitution, and sections 2.001(b) and 6.204(b) of the Texas Family Code. *See* ROA.21-36. The Plaintiffs alleged that these laws

(collectively, Texas' marriage laws) violated the due-process and equal-protection clauses of the Fourteenth Amendment. *See id.* On February 26, 2014, the district court entered a preliminary injunction holding that Texas' marriage laws fail rational-basis review and holding, in the alternative, that same-sex marriage qualifies as a "fundamental" substantive-due-process right. *See* ROA.2001-2048.

Since the issues in this case were percolating in many cases across the country and were likely to be decided by the Supreme Court, which stayed a similar injunction in a challenge to Utah's marriage laws, the district court stayed its preliminary injunction and allowed Texas law to remain in force pending appellate review. *See* ROA.2048. The Plaintiffs did not object to a stay of the preliminary injunction, *see* ROA.3564:14-19, and did not oppose the State's motion to stay all proceedings pending appellate review, which was granted on March 7, 2014. *See* ROA.2057. But months later, the Plaintiffs changed their minds and moved to lift the stay, despite the fact that this Court had recently stayed a similar injunction in a Mississippi case. *See* ROA.2281-2286. Unsurprisingly, the district court denied their motion. *See* ROA.2267-2272.

The Plaintiffs' motion to lift the stay was equally unsuccessful in this Court, which denied the motion as moot upon issuing its decision. *De Leon v. Abbott*, 791 F.3d 619, 625 n.2 (5th Cir. 2015). While the appeal was pending in this Court, the Supreme Court issued its decision in *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015), declaring a federal constitutional right to same-sex marriage. In light of the binding constitutional ruling in *Obergefell*, the district court lifted the stay of the preliminary injunction and, on July 1, 2015, this Court affirmed the district court's grant of the preliminary injunction and issued a mandate for the district court to enter judgment in favor of the Plaintiffs. *See De Leon*, 791 F.3d at 624-25. On July 7, 2015, the district court entered a final judgment in favor of the Plaintiffs. *See* ROA.2400.

Although the Plaintiffs' counsel held themselves out to the public as handling this case *pro bono*,[1] the Plaintiffs sought an award of $713,602 in attorney's fees and $20,202.90 in costs. *See* ROA.3366. The

[1] *See, e.g.*, Akin Gump, *Awards & Accolades*, *Neel Lane Among Finalists for Texas Lawyer "Attorney of the Year" Honor* (Nov. 2, 2015), https://www.akingump.com/en/news-insights/neel-lane-among-finalists-for-texas-lawyer-attorney-of-the-year-1.html (the Plaintiffs' law firm describing its "pro bono representation of two same-sex couples who sued the State of Texas in order to declare unconstitutional provisions in the Texas Constitution and laws banning same-sex marriage").

State challenged the reasonableness of the request, and requested that the district court reduce the award to no more than $377,674.20 in attorney's fees and $5,369.56 in costs. *See* ROA.3163-3349. Although the district court reduced the hourly rates for the Plaintiffs' attorneys, it failed to reduce the number of hours billed, or the costs. *See* ROA.3501-3504. The district court awarded $585,470.30 in attorney's fees and $20,202.90 in costs. *See* ROA.3506.

Standard of Review

This Court reviews an award of attorney's fees and costs for abuse of discretion. *See*, *e.g.*, *Davis v. Abbott*, 781 F.3d 207, 213 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 534 (2015); *Brown v. Wilson County*, 64 F. App'x 416 (5th Cir. 2003). In evaluating whether the district court abused its discretion, this Court reviews the district court's decision *de novo,* and reviews the district court's factual findings for clear error. *Davis,* 781 F.3d at 213.

Although remand to the trial court is normal when it is determined on appeal that an attorney's fee award has been improperly calculated, an appellate court may exercise its option to modify the award itself if the record contains sufficient information to allow a fair determination

of a reasonable fee. *La. Power & Light Co. v. Kellstrom*, 50 F.3d 319, 325-27 (5th Cir. 1995).

Summary of the Argument

The district court awarded the Plaintiffs $585,470.30 in attorney's fees and $20,202.90 in costs for prevailing on a pre-discovery preliminary injunction and receiving a summary affirmance by this Court due to the Supreme Court's resolution of a different case.

Equity and well-established case law require a reduction in the fees and costs awarded to the Plaintiffs. At $585,470.30, the attorney's fees award at issue in this appeal is higher than that received by others in similar challenges to state laws. That could be, in part, because the hourly rate used to compute this excessive award is outside the prevailing market rates. And these are not the only ways in which the district court abused its discretion in its fees and costs award.

The district court's award also permitted the Plaintiffs to recoup for excessive hours billed in relation to their briefing and in preparing for and attending the preliminary injunction hearing and oral argument. How do we know the billed hours were excessive? They include instances where three or four attorneys bill for a hearing or argument where only

one actively participates. They also received fees for their travel time at their full hourly rate. Even hours billed for purely clerical tasks were awarded. Lastly, the award includes fees for unwarranted categories of work—like work associated with the Chris Sevier intervention, media relations, and supporting other amici.

The cost award fares no better. The district court permitted costs for extravagant and non-compensable expenses. Celebratory drinks, posh hotel charges, and unnecessary travel are all costs being footed by the State under the district court's award. Equity demands that this Court correct the boon in fees and costs provided the Plaintiffs and reduce the award of fees and costs to no more than $377,674.20 in attorney's fees and $5,369.56 in costs.

Argument

Although a district court has broad discretion to award attorney's fees, *Hopwood v. Texas*, 236 F.3d 256, 277 (5th Cir. 2000), and costs to the prevailing party, *Brazos Valley Coal. of Life, Inc. v. City of Bryan, Tex.,* 421 F.3d 314, 327 (5th Cir.2005), that discretion is not unlimited. *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 558 (2010).

Based on the district court's order, that court's review of the hours claimed and the objections asserted falls well short of the standard required of district courts. The district court is not only required to determine whether the total hours claimed are reasonable, but also whether particular hours claimed were "reasonably expended." *La. Power & Light Co.*, 50 F.3d at 325 (citing *Alberti v. Klevenhagen*, 896 F.2d 927, 931 (5th Cir. 1990), *opinion vacated in part on reh'g,* 903 F.2d 352 (5th Cir. 1990)).

Here, the district court failed to find that any of the claimed hours, other than those excluded as either vague or duplicative entries, were reasonably expended. *See* ROA.3502-3504.

I. THE DISTRICT COURT'S AWARD OF ATTORNEY'S FEES AND COSTS IS NOT EQUITABLE.

The Plaintiffs sought an award of $713,602 in attorney's fees and $20,202.90 in costs for obtaining a preliminary injunction and the appeal of this matter. *See* ROA.3366. After reducing the hourly rate, the district court awarded $585,470.30 in attorney's fees for 1706.8 billed hours, and full costs of $20,202.90. *See* ROA.3506. This lawsuit did not involve any discovery, depositions, or a trial that would warrant such excessive fees and costs.

The fees and costs awarded far exceed the awards other courts have arrived at in similar same-sex marriage lawsuits. Indeed, in a much more protracted and complex lawsuit, the prevailing party sought only $197,710 for an injunction against the State of Alabama's constitutional amendment, and appeal of that injunction. *See Searcy v. Bentley,* Civ. A. No. 1:14-cv-00208-CG-N, (Doc. 76-1). This lawsuit did not involve any discovery, depositions, or a trial that would warrant such excessive fees and costs.

The Plaintiffs do not cite to any fee and cost awards in other similar same-sex marriage lawsuits to justify the reasonableness of the number of hours they billed or their hourly rates. *See* ROA.3358. In *Latta v. Otter*, Civ. A. No. 1:13-CV-00482-CWD, 2014 WL 7245631, at *8 (D. Idaho Dec. 19, 2014), a case cited by the Plaintiffs, the court did award $397,300 in attorney's fees and $4,363.08 in expenses, but that case is distinguishable. *Latta* involved extensive briefing on dispositive motions, including a Motion for Summary Judgment and Motion to Dismiss, and a Motion to Intervene by the State of Idaho. *See id.* The other cases cited by the Plaintiffs involved only requests for attorney's fees or cases in which the parties settled the fees and expenses. *See* ROA.3358.

The district court also failed to take into consideration that the Plaintiffs reaped significant noneconomic rewards through their representation in this case for their *pro bono* work, which they now have been awarded three-quarters of a million dollars. *See* ROA.3183-3184. As the State conceded, although the law does provide an award of attorney's fees to attorneys that take on *pro bono* cases, *see id.*, the Plaintiffs were required to use billing judgment in submitting only hours that they normally would to a paying client. *See Hensley v. Eckerhart,* 461 U.S. 424, 434, 437 (1983), *abrogated on other grounds by Gisbrecht v. Barnhart,* 535 U.S. 789, 795-805 (2002) ("'[B]illing judgment'" is to be exercised "with respect to hours worked," consistent with the requirement that "'[h]ours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority.'").

And the district court was required to fulfill its duty by examining the fee application for non-compensable hours, *Bode v. United States,* 919 F.2d 1044, 1047 (5th Cir. 1990), and determine whether the hours were reasonably expended. *See League of United Latin American Citizens No. 4552 (LULAC) v. Roscoe Indep. Sch. Dist.*, 119 F.3d 1228, 1232 (5th Cir. 1997). Here, the district court abused its discretion in failing to

adequately review the Plaintiffs' fee application, apply the applicable law, examine other similar fee awards, and in finding that the hours billed by the Plaintiffs were reasonably expended.

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN AWARDING THE PLAINTIFFS HOURLY RATES OUTSIDE OF THE PREVAILING MARKET RATE.

Although the district court reduced the hourly rates requested by the Plaintiffs, the hourly rates the district court awarded are still outside of the prevailing market rate. *See* ROA.3502.

"The hourly rates to be used in the lodestar calculation are determined by 'the prevailing market rates in the relevant community.' " *Hoffman v. L & M Arts*, No. 3:10-CV-0953-D, 2015 WL 3999171, at *2 (N.D. Tex. July 1, 2015) (quoting *Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs,* 2013 WL 598390, at *5 (N.D.Tex. Feb.15, 2013) (citations omitted)). The "prevailing market rate" is the rate charged "for similar services by lawyers of reasonably comparable skill, experience, and reputation" *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984); "not the rates that 'lions at the bar may command.'" *Hopwood*, 236 F.3d at 281 (quoting *Leroy v. City of Hous.,* 906 F.2d 1068, 1079 (5th Cir. 1990)).

The "relevant legal market" is generally the community where the district court sits, even if a party utilizes counsel from outside the district. *Id.*; *McClain v. Lufkin Indus.*, 649 F.3d 374, 381-83 (5th Cir. 2011). Because the prevailing market rate is that charged for "similar services," the court considers the type of representation and the subject matter of the litigation. *Hoffman*, 2015 WL 3999171, at *2.

The following table shows a comparison of the hourly rates set by the State Bar of Texas Department of Research and Analysis Hourly Rate Report, the Texas Lawyer 2015 Annual Salary & Billing Report, and the State Bar of Texas 2014 Paralegal Survey, compared with the hourly rates requested by the Plaintiffs and those awarded by the district court based on years of experience and the San Antonio geographic area:

Name of Attorney/ Paralegal[2]	Years	Hours	Requested Hourly Rate	Hourly Rate Award[3]	State Bar of Texas 2013 Hourly Fact Sheet[4]	Texas Lawyer 2015 Annual Salary & Billing[5]
CHASNOFF, BARRY A.	40	73.7	$500	$400	$263	$325
COOLEY, MICHAEL PARSONS	16	145.4	$460	$368	$253	$300
LANE, DANIEL MCNEEL	25	259.7	$500	$400	$235	$325
NEWMAN, ANDREW F	8	84.4	$400	$320	$199	$250
PEPPING, MATTHEW E.	7	573.6	$400	$320	$199	$250
SHAH, PRATIK A.	14	31.6	$500	$400	$234	$300
STENGER-CASTRO, FRANK	42	20.5	$365	$292	$263	$325
WEISEL, JESSICA	20	474.4	$430	$344	$235	$325
SLAVIN, RISA (Paralegal)	26	11.7	$165	$165	$121[6]	$75
WEHLEND, LISA (Paralegal)	35	31.8	$135	$135	$121[7]	$75
TOTAL		**1706.8**	$730,282	$585,470.30	$377,674.20	$490,060

[2] *See* Plaintiffs' Motion for Attorneys' Fees and Costs, which includes a chart with the names of the attorneys and paralegals, their years of experience, the hours billed, and the requested hourly rates from which the data in this chart is derived. ROA.2579-2580.

[3] *See* Order. ROA.3502.

[4] *See* State Bar of Texas Department of Research and Analysis 2013 Hourly Fact Sheet,https://www.texasbar.com/AM/Template.cfm?Section=Demographic_and_Economic_Trends&Template=/CM/ContentDisplay.cfm&ContentID=27264.

[5] *See* Exhibit D, Texas Lawyer 2015 Annual Salary & Billing Report. ROA.3347-3349.

[6] State Bar of Texas 2014 Paralegal Survey Results. *See* State Bar of Texas Department of Research & Analysis 2014 Paralegal Division Compensation Survey, https://txpd.org/files/file/SalarySurvey/2014%20Salary%20Survey%20Results%20Final.pdf.

[7] *Id.*

Despite the district court taking judicial notice of the State Bar of Texas Department of Research and Analysis Hourly Rate Report, the district court awarded the Plaintiffs almost $166 more per hour in some circumstances (hourly rate for Mr. Shah). *See* ROA.3501-3502. The district court did not take into consideration the Texas Lawyer 2015 Annual Salary & Billing Report, or the State Bar of Texas 2014 Paralegal Survey Results when assessing the hourly rates. *See id;* ROA.3185-3187.

The district court noted that it also considered the declarations submitted by the Plaintiffs in support of their requested hourly rates. *See* ROA.3501. The State disputed both declarations. *See* ROA.3184. The declaration from Saul Perloff is biased based on his former partnership with the Plaintiffs' counsel. *See id.* The Court should not accord this affidavit as much weight as it would to independent, objective attorney's affidavits. *See Carroll v. Sanderson Farms, Inc.,* Civ. A. H-10-3108, 2014 WL 549380, at *22 (S.D. Tex. Feb. 11, 2014) (affidavit from law school colleague who had worked with attorney not afforded as much weight as an independent, objective attorney's affidavit). Additionally, the declaration is unreliable since Mr. Perloff does not practice in the area of civil rights, but instead works on primarily trademark and patent cases

that incur substantially higher hourly rates. *See id.* The declaration from Carlos Soltero did not support the Plaintiffs' request for hourly rates of $500 an hour for an attorney with the same years of experience. *See id.*

The district court opined that it also assessed the hourly rates based on those recently awarded in other cases. *See* ROA.3501-3502. The only case cited by the district court is *Catholic Leadership Coalition of Tex. v. Reisman,* No. A-12-CA-566-SS, 2015 WL 418117, at *5 (W.D. Tex. Jan. 30, 2015). However, in *Reisman* the defendant did not dispute the reasonableness of the hourly rates requested. *Id.* Additionally, in comparison to this case, the maximum hourly rate awarded by the district court in that case was $300, not $400. *Id.* The district court offers no other authority for the hourly rates awarded to the Plaintiffs.

Accordingly, the district court abused its discretion in awarding hourly rates that are not within the prevailing market rate. *See Swiney v. Texas*, No. SA–06–CA–0941 FB NN, 2008 WL 2713756, at *5 (W.D.Tex. July 3, 2008) (noting that "[a] reasonable fee can be determined by examining the State Bar of Texas Hourly Rate Report" and using it to verify the reasonableness of the proposed fee amount). The State requests that the Court utilize the hourly rates assessed by the State Bar of Texas

2013 Hourly Fact Sheet and State Bar of Texas 2014 Paralegal Survey Results in reducing the fee award to no more than $377,674.20, which includes the entire 1706.8 hours billed by the Plaintiffs.

III. THE DISTRICT COURT ABUSED ITS DISCRETION BY AWARDING ATTORNEY'S FEES TO THE PLAINTIFFS FOR HOURS THAT WERE NOT REASONABLY EXPENDED.

The fee applicant bears the burden of establishing the reasonableness of the number of hours expended on the litigation, *Leroy,* 906 F.2d at 1079, and must present adequately documented time records to the court. *Watkins v. Fordice,* 7 F.3d 453, 457, (5th Cir. 1993). In several instances, the Plaintiffs failed to meet their burden of justifying their fee award, and proving that they exercised billing judgment. *See Saizan v. Delta Concrete Prods. Co., Inc.,* 448 F.3d 795, 799 (5th Cir.2006); *see also Hensley*, 461 U.S. at 434, 437 ("'[B]illing judgment'" is to be exercised "with respect to hours worked," consistent with the requirement that "'[h]ours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority.'").

A court is not only required to determine whether the total hours claimed are reasonable, but also whether particular hours claimed were

"reasonably expended." *La. Power & Light Co.,* 50 F.3d at 325; *LULAC,* 119 F.3d at 1232. *See also Bode,* 919 F.2d at 1047 ("In determining the amount of an attorney fee award, courts customarily require the applicant to produce contemporaneous billing records or other sufficient documentation so that the district court can fulfill its duty to examine the application for non-compensable hours.").

Using this documented time as a benchmark, the court must exclude hours which, though actually expended, are excessive, duplicative, or inadequately documented. *McClain v. LuJkin Indus., Inc.,* 649 F.3d 374, 381 (5th Cir. 2011); *Watkins,* 7 F.3d at 457. Only those hours that survive this vetting process are considered hours "reasonably expended on the litigation" and subject to a fee award. *Hensley*, 461 U.S. at 432-34.

A. The District Court Relied on Billing Records that Were Vague, Included Block-Billing, and Included Potentially Duplicative Billing.

This Court has held that counsel seeking fee awards cannot merely submit a broad summary of work performed and the hours logged, but rather must present "adequate evidence of the hours spent on the case and that those hours were reasonably expended." *Ragan v. Comm'r*, 135

F.3d 329, 335 (5th Cir. 1998). *See Edmond v. Oxlite Inc.,* No. Civ. A. 01-2594, 2005 WL 2458235, at *4 (W.D. La. Oct. 5, 2005) ("Fifth Circuit frowns on vague notations such as "work on brief" or "review for oral argument" as well as consolidated individual items into one large block of time for each day."); *La. Power & Light Co.*, 50 F.3d at 327 ("Litigants take their chances when submitting [vague] fee applications, as they provide little information from which to determine the 'reasonableness' of the hours expended on tasks vaguely referred to as 'pleadings,' 'documents,' or 'correspondence' without stating what was done with greater precision.").

Similarly, a fee award cannot extend to "block-billed" time entries where attorneys group several different tasks into one time entry "because it prevents the court from accurately determining the time spent on any particular task, thus impairing the court's evaluation of whether the hours were reasonably expended." *See Fabela v. City of Farmers Branch, Tex.*, No. 3:10-CV-1425-D, 2013 WL 2655071, at *7 n.14 (N.D. Tex. June 13, 2013).

Specific instances of some[8] of the vague, block-billed entries that make it impossible to determine the duplicative efforts of the attorneys and whether the time was reasonably billed include:

- "Draft complaint regarding same sex marriage; Revise same; Confer with client regarding lawsuit; Confer with Frank Stenger-Castro regarding lawsuit and strategy" (9.1), September 9, 2013 time entry of Matthew Pepping. *See* ROA.3298-3299;
- "Work on Complaint; Prep for meeting with clients" (2.80), September 13, 2013 time entry of Barry Chasnoff. *See id.*;
- "Research re: and draft reply in support of preliminary injunction; review Oklahoma district court ruling re: same-sex marriages" (4.1), January 14, 2014 time entry of Jessica Weisel. *See* ROA.3304-3305;
- "Draft reply in support of motion for preliminary injunction; Revise same" (6.4), January 20, 2014 time entry of Matthew Pepping. *See id.*;
- "Research and draft sections of appellee's brief" (8.7), August 18, 2014 time entry of Michael Cooley. *See* ROA.3306-3311;
- "Research and draft appellee brief; Weekly conference call with clients" (9.1), August 22, 2014 time entry of Matthew Pepping. *See id.;*

[8] See the State's Exhibits A-9 through A-13 at ROA.3298-3319, for a complete listing of all of the vague, block-billed, and potentially duplicative entries the State timely objected to for preparation and review of Plaintiffs' Original Complaint for Declaratory and Injunctive Relief, Motion for Preliminary Injunction, Reply in Support of Motion for Preliminary Injunction, and Brief of Appellees, as well as preparation for the preliminary injunction and oral argument. The data in these exhibits, as well as all charts in this brief, was derived from a review of the Plaintiffs' billing records at ROA.2751-2844. In addition to the charts created by the State, the State also used the charts created by the Plaintiffs' for their billing records, and created a separate column named "CODE" to identify those entries the State objected to as reasonably expended. These charts can be found in Exhibit A at ROA 3194-3254. The coding designations for the column named "CODE" can be found in Exhibit B at ROA.3345.

- "Prepare for oral argument" (1.2) February 8, 2014, (8.7) February 9, 2014, and (11.9) February 10, 2014 time entries of Matthew Pepping. *See* ROA.3313.

The district court found that none of the entries were duplicative or vague. *See* ROA.3503.

With regards to the State's duplicity objection, the district court stated, "[p]laintiff attorneys' entries indicate that certain tasks *may* not have been completed all at once." *See id.* (emphasis added). The district court draws an assumption and hedges its response with the word "may" because the billing records as asserted by the Plaintiffs were insufficient to determine whether the hours claimed were reasonable for the work performed. The district court did not make any findings of fact regarding its rationale for holding that none of the billing entries objected to were vague.

The district court abused its discretion in relying on the insufficient billing records submitted by the Plaintiffs, which are so vague in some instances, that they prevent a finding that all hours billed were reasonably expended. *See Leroy v. City of Houston (Leroy I),* 831 F.2d 576, 585–86 (5th Cir.1987) (finding clear error and abuse of discretion when district court accepted "faulty records" without making reduction); *Leroy*,

906 F.2d at 1080 (eliminating hours where the task descriptions are "not illuminating as to the subject matter" or are "vague as to precisely what was done"). Based on the prevailing case law, if the movant's documentation is vague or incomplete, the court should reduce or eliminate those hours accordingly. *See LULAC*, 119 F.3d at 1233 (citing *La. Power & Light Co.*, 50 F.3d at 324); *Fabela*, 2013 WL 2655071, at *7 (75.4 hours spent "prepar[ing] the complaint" reduced to 10 hours due to use of vague descriptions and block-billing).

Recognizing that some law firms bill clients on a daily basis by block-billing, the Fifth Circuit has also recommended a reduction in fees claimed rather than excluding all of the time. *Edmond,* 2005 WL 2458235, at *4. *Hensley,* 461 U.S. at 433 (district court may reduce award where documentation of hours is inadequate). *See, e.g., Johnson–Richardson v. Tangipahoa Parish School Bd.,* Civ. A. No. 12–0140, 2013 WL 5671165, at *4 (E.D.La. Oct.15, 2013) (30% reduction for block billing, *citing Verizon Business Global LLC v. Hagan,* No. 07–0415, 2010 WL 5056021, at *5 (E.D.La. Oct.22, 2010) (citing cases showing that reductions for block billing between 15% and 35% have been found reasonable), vacated on other grounds, 467 Fed. Appx. 312, 2012 WL

1414448 (5th Cir. Apr.24, 2012). Here, the district court did not reduce any of the vague, block-billed hours requested by the Plaintiffs. The Court should deny the vague block-billed entries and reduce the time billed for all other block-billed entries by 20%.

B. The Attorney's Fees Awarded Were Excessive.

The district court in its analysis of the lodestar agreed that "this case did not require an excessive amount of time", *see* ROA.3504, "that the questions presented in this case were not novel to the extent that some district courts had previously dealt with the same issues", and "that the case did not require an excessive time commitment". *See* ROA.3505. Despite these factual findings, the district court abused its discretion by failing to reduce the number of billed hours.

Although the State objected to the excessiveness of the hours billed by the Plaintiffs' counsel for preparation and review of the pleadings (71.50 hours for the 16 page Plaintiffs' Original Complaint for Declaratory and Injunctive Relief; 192 hours for the Motion for Preliminary Injunction; 39.80 hours for the Reply in Support of Motion for Preliminary Injunction; and 258.80 hours for the Brief of Appellees),

the district court did not address this objection. *See* ROA.3298-3311; ROA.3172-3176.

Far from being a complex matter that required novel legal arguments and strategy, the Plaintiffs' counsel heavily relied on other court decisions striking down similar state laws. In their preliminary-injunction motion, for example, their counsel repeatedly cited *United States v. Windsor*, 133 S. Ct. 2675 (2013), as establishing that Texas law was unconstitutional, as well as a district court decision striking down a similar law in Ohio. *See, e.g.*, ROA.1084. Their reply in support of the preliminary injunction motion likewise relied heavily on court decisions in Oklahoma, Ohio, New Mexico, and Utah, which had struck down similar state marriage laws. *See, e.g.,* ROA.1702-1703, 1716-1717 ("passim" citations to same-sex marriage cases from Oklahoma and Utah, and relying on those courts' reasoning as a basis for prevailing on the preliminary injunction motion).

On appeal, the Plaintiffs continued to rely heavily on other courts' invalidation of similar marriage laws as a basis for victory. *See, e.g.*, Appellees' Br., Case No. 14-50196, Doc. No. 512761733 (5th Cir. Sept. 9, 2014) ("Since the Supreme Court's decision in *Windsor*, more than a

dozen federal courts have found laws banning marriage between same-sex couples are unconstitutional. . . . This Court should do the same and affirm the District Court's decision striking down Section 32 as unconstitutional."). The Plaintiffs' counsel now argues that they were blazing a new constitutional path to justify the substantial time spent on this streamlined proceeding, *see* ROA.2577 and 2588-2589, but as their pleadings show, they were simply following a trail cleared by other courts in other cases.

The district court also abused its discretion in failing to address the State's overstaffing objection. In multiple instances, the Plaintiffs' overstaffing caused their billing to be excessive. For example, they submitted billing entries for four attorneys in preparation and review of the 16 page Plaintiffs' Original Complaint for Declaratory and Injunctive Relief, four attorneys for the Motion for Preliminary Injunction, three attorneys for the Reply in Support of Motion for Preliminary Injunction, and five attorneys and one paralegal for the Brief of Appellees. *See* ROA.3298-3311; ROA.3172-3176.

The district court did not find that the participation of numerous attorneys for each of these pleadings was necessary. *See Leroy*, 906 F.2d

at 1079 ("Hours which, though actually expended, nevertheless are excessive, redundant, or otherwise unnecessary, or which result from the case being overstaffed, are not hours reasonably expended and are to be excluded" from a fee award.); *Bishop v. Smith*, No. 04-CV-848-TCK-TLW, 2015 WL 4086356, at *12 (N.D. Okla. May 1, 2015) (three-attorney review process for the appellate brief was excessive warranting a reduction for award of attorney fees; trial counsel must rely on expertise of drafter and avoid duplication of his efforts).

Additionally, the district court abused its discretion in failing to address the State's objection to the excessiveness of the hours billed in preparation for the preliminary injunction hearing and oral argument. This case is not procedurally complicated. The preliminary injunction hearing was approximately 1.8 hours, and only two attorneys, Mr. Chasnoff and Mr. Lane, presented argument on behalf of the Plaintiffs, as Mr. Pepping and Mr. Cooley passively observed. *See* ROA.3177-3179. Yet, three attorneys (Mr. Pepping, Mr. Chasnoff, and Mr. Lane) billed 81.90 hours for preparing for the preliminary injunction hearing. *See* ROA.3316. And all attorneys billed their time to the State for attendance at the preliminary injunction hearing:

ATTENDANCE AT PRELIMINARY INJUNCTION HEARING			
DATE	**PROFESSIONAL**	**TIME**	**DESCRIPTION**
2/12/2014	COOLEY, MICHAEL PARSONS	5.2	Attend preliminary injunction hearing; return travel from San Antonio to Dallas.
2/12/2014	LANE, DANIEL MCNEEL	8.5	Prepare for and argue preliminary injunction; media memos, pictures, interview; review Kentucky decision.
2/12/2014	PEPPING, MATTHEW E.	7	Prepare for and attend preliminary injunction hearing; Draft notice of recent authority regarding Kentucky decision; Draft response to defendants' reliance on Merritt decision at oral argument.
2/12/2014	CHASNOFF, BARRY A.	6	Prep for and hearing; Follow-up.

See ROA.3317.

Similarly, oral argument on appeal for each side was approximately 30 minutes, and only one attorney, Mr. Lane, presented argument on behalf of the Plaintiffs, as Mr. Newman, Mr. Pepping, and Ms. Weisel passively observed. *See id.* However, four attorneys (Mr. Pepping, Mr. Cooley, Mr. Lane, and Ms. Weisel) billed 154.2 hours for preparation of the oral argument. *See* ROA.3318-3319. Neither the preliminary injunction hearing, nor oral argument, necessitated the excessive amount of time billed for their preparation. All four billed for their attendance at the oral argument:

ATTENDANCE AT ORAL ARGUMENT			
DATE	**PROFESSIONAL**	**TIME**	**DESCRIPTION**
1/9/2015	LANE, DANIEL MCNEEL	7.1	Prepare for and attend oral argument; meetings with clients, Matt Pepping, Barry Chasnoff; press interviews; review press reports.
1/9/2015	NEWMAN, ANDREW F	7.5	Attend oral argument in same-sex marriage cases; return travel to Dallas.
1/9/2015	PEPPING, MATTHEW E.	12.7	Fifth Circuit oral argument; Return travel to San Antonio.
1/10/2015	WEISEL, JESSICA	5.3	Return travel from oral argument.

See ROA.3320.

As for the passive observance of Mr. Pepping and Mr. Cooley at the preliminary injunction hearing, and Mr. Newman, Mr. Pepping, and Ms. Weisel at the oral argument, the district court should have excluded these billed hours. *See* ROA.3179-3180. *See, e.g., Flowers v. Wiley*, 675 F.2d 704, 705 (5th Cir. 1982) (rejecting compensation for hours spent in duplicative activity or in the role as a passive observer while other attorneys performed); *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980) (No compensation is due for unproductive time such as where three attorneys are present at a hearing when one would suffice).

The following table shows that $12,440.80 in attorney's fees should be reduced from the district court's award to the Plaintiffs based on the hourly rates assessed by the district court:

SUMMARY OF HOURS OF ATTENDANCE FOR PASSIVE OBSERVERS			
Name of Attorney/Paralegal	**Hours**	**Hourly Rate**	**Awarded**
COOLEY, MICHAEL	5.2	$368	$1,913.60
NEWMAN, ANDREW F	7.5	$320	$2,400.00
PEPPING, MATTHEW E.	19.7	$320	$6,304.00
WEISEL, JESSICA	5.3	$344	$1,823.20
TOTAL	**37.7**		**$12,440.80**

See ROA.3317, 3320. This is the total of hours billed by multiple attorneys where only one of them performed the work. Accordingly, the district court erred by awarding the Plaintiffs attorney's fees in the amount of $12,440.80 for attendance by multiple attorneys at the preliminary injunction hearing and oral argument that was not reasonably billed.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION BY AWARDING ATTORNEY'S FEES TO THE PLAINTIFFS THAT ARE NON-COMPENSABLE.

Before examining a plaintiffs' lodestar calculation, the district court must reduce the fee request to account for billings and expenses not permitted by law. Here, the district court skipped this step. A careful review of the Plaintiffs' requested fees shows several categories of work that is not compensable through a proper fee award.

A. The Plaintiffs Are Not Entitled To Recover Their Full Hourly Rates For Hours Billed While Traveling.

The Fifth Circuit has held that time spent for travel should not be billed at the same hourly rate sought for active legal work, and should be reduced by fifty percent. *See Hopwood v. State of Tex.,* 999 F. Supp. 872, 914 (W.D. Tex. 1998) *aff'd in part, rev'd in part sub nom. Hopwood v. State of Texas*, 236 F.3d 256 (5th Cir. 2000) (reducing fees for travel time by fifty percent); *Bd. of Supervisors of La. State Univ. v. Smack Apparel,* No. 04–1593, 2009 WL 927996, at *6 (E.D. La. Apr.2, 2009) ("[T]ravel time ... in the Fifth Circuit is usually compensated at 50% of actual time."); *cf. Alex v. KHG of San Antonio, LLC, No.* 5:13-CV-0728 RCL, 2015 WL 5098327, at *5 (W.D. Tex. Aug. 28, 2015) (reducing fees for travel time by fifty percent since billing records were unclear whether any work was performed while in transit).

Because the time entries prepared by the Plaintiffs' counsel contain block-billing, it is impossible to ascertain how many hours were solely spent traveling. *See* ROA.3321-3322. The Plaintiffs offered no clarifying information stating how many hours were billed solely for travel, or whether any active legal work was performed during the hours spent

traveling.[9] The State requested that the district court reduce by fifty percent the approximately 114.1[10] hours the Plaintiffs sought to recover that related to travel. *See* ROA.3321-3322. However, the district court failed to make any findings distinguishing whether the entries identified by the State included work performed while in transit so as to justify awarding the Plaintiffs the full hourly rate for this time.

The following table shows that $20,228 in attorney's fees should be reduced from the district court's award to the Plaintiffs based on the hourly rates assessed by the district court for the hours spent traveling:

HOURS BILLED TRAVELING				
Name of Attorney/Paralegal	**Hours**	**Hourly Rate**	**Awarded**	**50% Reduction**
COOLEY, MICHAEL PARSONS	9.8	$368	$3,606.40	$1,803.20
LANE, DANIEL MCNEEL	20.1	$400	$8,040.00	$4,020.00
NEWMAN, ANDREW F	11.8	$320	$3,776.00	$1,888.00
PEPPING, MATTHEW E.	39.0	$320	$12,480.00	$6,240.00
SHAH, PRATIK A.	19.0	$400	$7,600.00	$3,800.00
WEISEL, JESSICA	14.4	$344	$4,953.60	$2,476.80
TOTAL	**114.1**		**$40,456.00**	**$20,228.00**

[9] The State preserved this issue for appeal by timely objecting to the Plaintiffs' request for attorney's fees at their full hourly rates for time billed traveling. *See* ROA.3180-3181; ROA.3321-3322. The district court did not address this objection in its order. *See* ROA.3497-3506.

[10] The Chart for Exhibit A-14 inaccurately showed the total number of travel hours as 103.6 hours. The correct number of hours associated with travel is 114.1 hours.

See ROA.3321-3322. Accordingly, the district court erred in awarding $40,456 in attorney's fees to the Plaintiffs for time billed traveling, and this Court should reduce this award to no more than $20,228.

B. The Plaintiffs Should Not Be Awarded Attorney's Fees for Purely Clerical Tasks.

This Court has also routinely denied requests for attorney's fees for purely clerical work. *See, e.g., Burnley v. City of San Antonio*, 2004 WL 2397575, *4 (W.D. Tex. Sept. 15, 2004), *aff'd as to attorney's fees*, 470 F.3d 189, 200 (5th Cir. 2006) (holding that the court must not award fees for clerical or secretarial tasks, regardless of whether they are performed by an attorney, paralegal, or secretary); *Allen v. U.S. Steel Corp.*, 665 F.2d 689, 697 (5th Cir. 1982) (paralegal tasks are recoverable only to the extent that the duties performed were similar to those typically performed by an attorney); *In re Witts*, 180 B.R. 171, 173 (E.D. Tex. 1995) (disallowing recovery of paralegal time for proofreading and revising documents).

The time entries prepared by the Plaintiffs' counsel contain multiple entries for time that is purely clerical in nature, such as preparing notebooks and filing documents, performed by legal counsel

and paralegals for the Plaintiffs. *See* ROA.3272-3275. Because these types of tasks are not the types of duties typically performed by an attorney, they are non-recoverable. *See Burnley,* 2004 WL 2397575, *4, *aff'd as to attorney's fees*, 470 F.3d at 200; *Allen,* 665 F.2d at 697. Although a large majority of these entries are block-billed and contain compensable work as well, the district court abused its discretion by awarding the Plaintiffs attorney's fees for these types of tasks without making any findings that the tasks were not purely clerical in nature.[11]

The following table shows that 114.8 hours were submitted by the Plaintiffs for purely clerical tasks. Based on the hourly rates assessed by the district court, the district court awarded the Plaintiffs $32,059.70 in attorney's fees for these activities:

HOURS BILLED FOR CLERICAL			
Name of Attorney/Paralegal	**Hours**	**Hourly Rate**	**Awarded**
CHASNOFF, BARRY A.	6	$400	$2,400
LANE, DANIEL MCNEEL	6.4	$400	$2,560
NEWMAN, ANDREW F	3.8	$320	$1,216
PEPPING, MATTHEW E.	62.1	$320	$19,872
WEISEL, JESSICA	4.8	$344	$1,651.20
SLAVIN, RISA	2.7	$165	$445.50
WEHLEND, LISA	29	$135	$3,915
TOTAL	**114.8**		**$32,059.70**

[11] The State preserved this issue for appeal by identifying and objecting to entries in the Plaintiffs' billing records that were purely clerical. *See* ROA.3168; ROA.3272-3275. The district court did not address this objection in its order. *See* ROA.3497-3506.

See ROA.3272-3275. Accordingly, the district court erred by awarding the Plaintiffs attorney's fees for purely clerical work.

C. The Plaintiffs Should Not Be Permitted To Recover Fees Associated with the Chris Sevier Intervention.

In *Hopwood*, the trial court held that "plaintiffs are not prevailing parties as against the defendants on the issue of intervention" and "they are not entitled to attorneys' fees for time spent litigating that issue." *Hopwood,* 999 F.Supp. at 913. It also noted that several circuit courts have read *Independent Fed. of Flight Attendants v. Zipes,* 491 U.S. 754, 761 (1989), to "imply that plaintiffs should bear the risk of incurring intervention-related costs as a result of filing a lawsuit and have therefore extended *Zipes*'s holding to a prevailing party's claims for intervention-related expenses to the losing defendant." *Id. See Rum Creek Coal Sales, Inc. v. Caperton,* 31 F.3d 169, 176–78 (4th Cir. 1994) ("*Zipes* instructs us not to shift intervention-related expenses to the losing defendant."); *Bigby v. City of Chicago,* 927 F.2d 1426, 1428–29 (7th Cir.1991) ("*Zipes* indicates that a ... defendant's fee liability does not presumptively extend to cover fees incurred by plaintiffs in litigating third-party interests ....").

Based on this precedent, the Plaintiffs are not entitled to recover fees associated with litigating against a proposed-intervenor. *Hopwood,* 999 F.Supp. at 913-14. *See Bigby*, 927 F.2d at 1429 (holding that the plaintiff could not recover against a defendant that opposed intervention). During the appeal to this Court on June 27, 2014, this Court denied Chris Sevier's motion to intervene in the lawsuit to join in with the Plaintiffs' briefs and to participate in oral argument. *See* ROA.3167.

The State timely objected to the Plaintiffs' request for 13.8 hours in attorney's fees associated with the Chris Sevier intervention. *See* ROA.3167-3168; ROA.3276. However, the district court did not address this objection in its order, and abused its discretion by shifting these fees, in the amount of $5,104, based on the hourly rates assessed, to the State, in contradiction to the prevailing case law[12]:

[12] Chris Sevier is a very litigious individual who has sought to intervene in other same-sex marriage lawsuits including: *Bourke v. Beshear*, 135 S. Ct. 1729, 191 L. Ed. 2d 674 (2015) (Motion of Chris Sevier for leave to intervene denied); *Tanco v. Haslam*, 135 S. Ct. 1169, 190 L. Ed. 2d 910 (2015) (Motion of Chris Sevier for leave to intervene denied); *Herbert v. Kitchen*, 135 S. Ct. 396, 190 L. Ed. 2d 248 (2014) (Motion of Chris Sevier for leave to intervene is denied).

HOURS BILLED FOR SEVIER INTERVENTION			
Name of Attorney/Paralegal	**Hours**	**Hourly Rate**	**Awarded**
LANE, DANIEL MCNEEL	7.1	$400	$2,840
NEWMAN, ANDREW F	.5	$320	$160
PEPPING, MATTHEW E.	1.2	$320	$384
WEISEL, JESSICA	5.0	$344	$1,720
TOTAL	**13.8**		**$5,104**

See ROA.3276. The district court erred by awarding the Plaintiffs attorney's fees associated with the Sevier intervention, and as a result, this Court should reduce the attorney's fee award to the Plaintiffs in the amount of $5,104.

D. Attorney's Fees Associated With Promoting The Plaintiffs' Position To The Media Should Not Have Been Awarded.

The district court abused its discretion in awarding attorney's fees to the Plaintiffs for their efforts related to interacting with the media. This Court has routinely denied requests for hours billed associating with the media as they are not reasonably related to the presentation of the case. *See, e.g., Watkins,* 7 F.3d at 458 (affirming district court that time spent on press conferences is not spent "on the litigation"); *Hopwood,* 999 F.Supp. at 912-13, *aff'd as to attorney's fees,* 236 F.3d at 280-81 (denial of

requests for attorney fees for time spent by counsel in press and television interviews, "reviewing clips", and other actions related to the media as they were not reasonable and necessary for prosecution of the case).

The court overruled the State's objection to the recovery of such fees since the Plaintiffs block-billed this non-compensable time with other compensable time. *See* ROA.3503. Although some of the time included in the block-billed entries may be compensable, the Plaintiffs should not be awarded the full amount of time requested. Because the Plaintiffs block-billed their time, it is impossible to determine how much time was devoted to compensable versus non-compensable activities. *See* ROA.3277-3288 For instance, on February 12, 2014, Mr. Lane billed 8.5 hours for "Prepare for and argue preliminary injunction; *media memos, pictures, interview;* review Kentucky decision." *See* ROA.3278.

Significantly, the Plaintiffs concede that media time is not compensable and that they are not seeking such time in their request for fees. *See* ROA.3362. However, several of the Plaintiffs' billing entries include time billed for interacting with the media.[13] In awarding

[13] The State identified and objected to entries totaling 11.8 hours for December 23, 2013, February 12, 2014, and February 9, 2015, billed by Mr. Lane. *See* ROA.3169-3170; ROA.3277-3288.

attorney's fees to the Plaintiffs for time associated with the media, the district court did not make any findings that their efforts in the media assisted in the litigation. *See Hopwood,* 999 F. Supp. at 913. Without such a finding and by relying on the block-billed records, the district court abused its discretion in awarding the Plaintiffs attorney's fees for their interaction with the media. The attorney's fees awarded to the Plaintiffs should be reduced by $4,720 for the 11.8 hours billed at the $400 hourly rate assessed by the district court for Mr. Lane. *See* ROA.3502.

E. The Plaintiffs Should Not Recover Attorney's Fees For Work Performed Supporting Other Amici.

This Court should not permit the Plaintiffs to recover fees for their time their counsel spent in connection with supporting other amici. *Glassroth v. Moore,* 347 F.3d 916, 918 (11th Cir. 2003). Courts have consistently rejected the award of such fees under similar circumstances. *Id.* It is thus settled that

> [a]n organization or group that files an amicus brief on the winning side is not entitled to attorney's fees and expenses as a prevailing party, because it is not a party. We will not allow that result to be changed by the simple expedient of having counsel for a party do some or all of the amicus work.

Id. at 919.

Specific examples provided by the *Glassroth* court of non-compensable time include "enlisting various organizations to appear as amici; suggesting potential signatories for the briefs; working on, supervising, and reviewing the amicus briefs; and seeing that they were mailed on time." *Id.* The court found that "[a] reasonable amount of time spent reading and responding to opposing amicus briefs is, of course, compensable." *Id.*

The same result was in reached in *Bishop,* 2015 WL 4086356, at *9. This case involved a review of an attorney's fee request challenging Oklahoma's constitutional amendment defining marriage. *Id.* There, the court held that "pre-filing activities must be carefully scrutinized and are not compensable if they constitute brainstorming potential amici, strategizing regarding potential amici, coordinating potential amici, soliciting potential amici, or drafting/editing an amicus brief." *Id.*

The Plaintiffs' billing records show numerous entries where they have billed time for participating in the exact activities that courts have found non-compensable.[14] For instance, on August 7, 2014, Mr. Lane

[14] The State preserved this issue for appeal by timely objecting to the Plaintiffs' request for attorney's fees billed in connection with supporting amicus briefs. *See* ROA.3165-3166; ROA.3264-3270. See the State's Exhibit A-2 at ROA 3264-3270, for

billed 1.7 hours for "Meet with Matt Pepping regarding getting faith leaders to sign an amicus brief; telecons with faith leaders regarding same…". *See* ROA.3267. Significantly, the Plaintiffs admit that they "had to marshal amicus support for [their] position and necessarily incurred time coordinating the numerous amicus briefs filed in their support." *See* ROA.2577[15]; *see also* ROA.2595 at ¶ 29 ("Akin Gump attorneys also spent significant time working with prospective amici curiae and their attorneys in connection with the appeal of this Court's preliminary injunction to the Fifth Circuit. Although Akin Gump personnel did not prepare any of the briefs of amicus curiae, attorneys helped identify potential amici curiae and identified subjects for possible briefs that might assist the Fifth Circuit in deciding the appeal.").[16]

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a complete listing of all the entries the State objected to. The district court did not address this objection in its order. ROA.3497-3506.

[15] According to the time entries, some of the amici that the Plaintiffs worked with included: Texas companies (March 7, 2014), Texas employers (March 8, 2014), HomeAway and Bazaarvoice (March 20, 2014), Southwest Airlines (April 1, 2014), GLAD (April 7, 2014), bar associations (May 21, 2014), Western Republican (June 5, 2014), Lambda Legal (June 24, 2014), Equality Texas and Cato Institute (July 2, 2014), Freedom to Marry (July 2, 2014), Forum for Equality Louisiana, Inc. (July 2, 2014), various businesses (July 3, 2014), various faith leaders (August 7, 2014), Texas Bar LGBT President and Munger Tolles (August 11, 2014). *See* ROA.3264-3270.

[16] Although the Plaintiffs note that in "one instance" their counsel did not submit any time entries in which they conferred with third-party attorneys about a possible brief that was never filed, *see id.,* they do not state the dates or number of hours billed that were deducted to verify that these entries were not submitted. *See* ROA.2595 at ¶ 29.

The State does not dispute that time spent responding to opposing amici briefs is compensable under *Bishop*. But because the Plaintiffs' evidence consisted of block-billing and vague entries, it is difficult to discern how much time was associated with each task. However, the State attempted to separate such time entries from the time entries the Plaintiffs' counsel billed for coordinating with amici, which is not compensable. *See Glassroth,* 347 F.3d 919; *Bishop,* 2015 WL 4086356, at *9; ROA.3264-3270. The Plaintiffs cited no authority for the proposition that the holdings in *Glassroth* and *Bishop* are not applicable here, *see* ROA.3364, and the district court did not address these holdings or the State's objection in its order.

The following table shows that the Plaintiffs were awarded $39,084.40, based on the hourly rates assessed by the district court, in attorney's fees for activities supporting other amicus briefs.

HOURS BILLED SUPPORTING AMICUS BRIEFS			
Name of Attorney/Paralegal	**Hours**	**Hourly Rate**	**Awarded**
CHASNOFF, BARRY A.	2.5	$400	$1,000.00
LANE, DANIEL MCNEEL	13.0	$400	$5,200.00
NEWMAN, ANDREW F	5.8	$320	$1,856.00
PEPPING, MATTHEW E.	34.3	$320	$10,976.00
WEISEL, JESSICA	58.1	$344	$19,986.40
SLAVIN, RISA	.4	$165	$66.00
TOTAL	**114.1**		**$39,084.40**

See ROA.3264-3270.

Accordingly, by failing to find that the time billed by the Plaintiffs was time spent responding to opposing amici briefs, instead of supporting amicus briefs, the district court erred in awarding $39,084.40 to the Plaintiffs.

V. THE DISTRICT COURT ABUSED ITS DISCRETION IN AWARDING EXPENSES THAT WERE EXTRAVAGANT, UNNECESSARY, AND UNRELATED TO THE LAWSUIT.

Although the award and calculation of other costs and expenses are committed to the district court's discretion, *see Curtis v. Bill Hanna Ford,* 822 F.2d 549, 553 (5th Cir. 1987), the district court must give "careful scrutiny" to the items proposed by the prevailing party. *La. Power & Light Co.,* 50 F.3d at 335 (citing *Farmer v. Arabian American Oil Co.,* 379 U.S. 227, 235 (1964)). Here, the district court abused its discretion in failing to disallow the costs objected to in contradiction to prevailing case law, including prior decisions in which the district court has disallowed the same costs.[17]

[17] The State preserved this issue for appeal by timely objecting to several of the costs submitted by the Plaintiffs as excessive, unnecessary, and unrelated to the lawsuit. *See* ROA.3187-3190; ROA.3323-3344. The district court found that the State's objections lacked merit and awarded the Plaintiffs the full amount of costs requested in the amount of $20,202.90. *See* ROA.3504.

The district court did not specifically address any of the objections made by the State or how these expenses are not deemed extravagant and unnecessary. These expenses included, but were not limited to, billing the State for beverages to celebrate after a hearing ($365.66), traveling to other cities to hold a moot court argument ($4,239.95), staying at luxurious hotels like the W Hotel during the oral argument ($381.45/night), and taking chauffeured car rides (e.g., $198). *See* ROA.3187; ROA.3330; ROA.3335-3344. Although a prevailing party is not limited to the costs set forth in 28 U.S.C. § 1920, all out-of-pocket costs "must not be awarded when they are extravagant or unnecessary." *Curtis,* 822 F.2d at 553.

The Plaintiffs claimed that the travel and attendance at a moot court argument held in Houston involved counsel in the Louisiana and Mississippi appeals as well as this case, and that it was essential for them to meet in person to understand the arguments in the other cases. *See* ROA.3366; ROA.3373 at ¶ 19. Although understanding the appellate arguments in the other cases may have been helpful, the Plaintiffs could have communicated with other counsel via telephone instead of billing approximately $4,239.95, which the Plaintiffs' counsel most likely would

not have billed to a client. *See Hensley*, 461 U.S. at 434, 437 ("'[B]illing judgment'" is to be exercised "with respect to hours worked," consistent with the requirement that "'[h]ours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority.'"). The court is also free to decline to award costs such as these where the expenses are not deemed to have been "reasonably necessary" to the litigation. *Alex,* 2015 WL 5098327, at *8. *See, e.g., Cypress–Fairbanks Indep. Sch. Dist. v. Michael F.,* 118 F.3d 245, 257–58 (5th Cir.1997).

The district court also failed to address the State's objections regarding the costs associated with attendance of passive observers at the preliminary-injunction hearing and oral argument on appeal, which totaled approximately $5,735.04. *See* ROA.3188; ROA.3330-3332; ROA.3335-3344. *Copeland*, 641 F.2d at 891 (No compensation is due for unproductive time such as where three attorneys are present at a hearing when one would suffice).

Additionally, the district court failed to address the State's objections to costs billed in this case incurred from other cases, such as filing fees ($16.68) in Cause No. D-1-GN-14-001855, and costs that are

non-recoverable such as pro hac vice fees ($25), which the district court has rejected in prior cases. *Davis,* 991 F.Supp.2d at 840 (pro hac vice fees and time spent in seeking admission pro hac vice are not recoverable as costs by a prevailing party). *See* ROA.3188; ROA.3329.

Furthermore, the Plaintiffs failed to make a connection between the duplicating costs incurred and the litigation, and the district court abused its discretion in awarding these fees in the amount of $1,811.90. *See* ROA.3188-3189; ROA.3326-3327. Costs of photocopies necessarily obtained for use in the litigation are recoverable upon proof of necessity, *Lewallen v. City of Beaumont*, No. CIV.A. 1:05-CV-733TH, 2009 WL 2175637, at *16 (E.D. Tex. July 20, 2009) aff'd, 394 F. App'x 38 (5th Cir. 2010), and connection between the costs incurred and the litigation. *Fogleman v. ARAMCO,* 920 F.2d 287, 286 (5th Cir. 1991)*; Maurice Mitchell Innovations, L.P. v. Intel Corp.,* 491 F.Supp.2d 684, 687 (E.D.Tex.2007)).

The table below shows the maximum costs that the Plaintiffs should recover:

SUMMARY OF RECOVERABLE EXPENSES	
CATEGORY	**TOTAL EXPENSE**
Courier Fees	$49.46
Retrieval of Legislative History Documents	$0.00
Duplicating Costs	$0.00
Expert Witness Fees	$4,600.00
Filing Fees	$532.05
Business Meals during Travel	$0.00
Parking for Hearings	$27.00
Fees for Court Reporter Transcript	$82.80
Travel Expenses	$78.25
TOTAL	**$5,369.56**

As the district court's order shows, the district court did not give "careful scrutiny" to the costs submitted by the Plaintiffs, and abused its discretion in awarding costs that were extravagant, unnecessary, and non-compensable. At most, the district court should have awarded the Plaintiffs $5,369.56 in costs, subject to a reduction for limited billing judgment. *See* ROA.3189-3190; ROA.3323-3344.

Conclusion

For the foregoing reasons, the district court abused its discretion in awarding attorney's fees in the amount of $585,470.30, and $20,202.90 in costs. This Court should correct the fees and costs provided the Plaintiffs and reduce the award of fees and costs to no more than $377,674.20 in attorney's fees, and $5,369.56 in costs. The Court should either modify the award, or remand to the district court to further

evaluate the billing records in light of the corresponding case law to determine whether the hours billed were reasonably expended.

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I certify that this document has been filed with the clerk of the court and served by ECF on April 8, 2016, upon:

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Certificate of Electronic Compliance

Counsel also certifies that on April 8, 2016, this brief was transmitted to Mr. Lyle W. Cayce, Clerk of the United States Court of Appeals for the Fifth Circuit, via the court's CM/ECF document filing system, https://ecf.ca5.uscourts.gov/.

Counsel further certifies that: (1) required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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With Type-Volume Limitation, Typeface Requirements, and Type-Style Requirements

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/s/ Summer R. Lee
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United States Court of Appeals

FIFTH CIRCUIT
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April 05, 2016

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No. 15-51241 Cleopatra DeLeon, et al v. Greg Abbott, et al
USDC No. 5:13-CV-982

Dear Ms. Lee,

The following pertains to your brief electronically filed on **March 28, 2016.**

We filed your brief. However, you must make the following corrections by **April 11, 2016.**

You need to correct or add:

1) Need a Sufficient Statement Regarding Oral Argument Stating Reasons Why Oral Argument Is (see 5TH Cir. R. 28.2.3.)

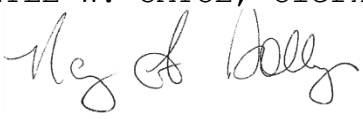
****NOTE****Once you have prepared your sufficient brief, you must select from the Briefs category the event, Proposed Sufficient Brief, via the electronic filing system. Please do not send paper copies of the brief until requested to do so by the clerk's office. The brief is not sufficient until final review by the clerk's office. If the brief is in compliance, paper copies will be requested and you will receive a notice of docket activity advising you that the sufficient brief filing has been accepted and no further corrections are necessary.

Also, you must electronically file your Record Excerpts by no later than **April 11, 2016.**

Opposing counsel's briefing time continues to run.

Sincerely,

LYLE W. CAYCE, Clerk



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